IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD NO: 5 of 2020 (MRHJ)

IN THE MATTER OF THE COMPANIES ACT (2022 Revision)

AND IN THE MATTER OF VIRGINIA SOLUTION SPC LTD

BETWEEN:

VALLEY HEALTH SYSTEM

Petitioner

-and-

AUGUSTA HEALTHCARE, INC.

Respondent

IN CHAMBERS

Before:	**The Hon. Justice Margaret Ramsay-Hale**
Appearances:	**Mr. Liam Faulkner and Ms Demi Mclean of Campbells LLP for the Petitioner Mr. Alex Potts QC and Mr. Spencer Vickers (28 April 2022 only) of Conyers Dill & Pearman LLP on behalf of the Respondent**
Heard	**28 and 29 April 2022**
Draft Circulated	**17 August 2022**
Judgment Delivered:	**23 August 2022**

HEADNOTE

Companies Act - Winding Up - Petition heard on an *inter partes* basis - Successful Petitioner's application for Indemnity costs - Companies Winding Up Rules O. 24, r 8(4) - Principles on which indemnity costs granted

Confidentiality Application - Companies Winding Up Rules O. 24 r 6 - principles governing exercise of the discretion to seal file- whether order in the interest of justice

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COSTS JUDGMENT

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1. The Petitioner, Valley Health System ("Valley Health") successfully petitioned for the winding up of Virginia Solution SPC Ltd., a Cayman Islands captive insurance company (the "Company") on the just and equitable basis due to an irretrievable breakdown in trust and confidence between Valley Health and the Respondent, Augusta Healthcare Inc ("Augusta"), the only other member

of the Company. The facts are set out fully in the judgment handed down on 10 February 2022 and will not be rehearsed here.

This Application

2. Valley Health now seeks an order that Augusta:

   (i) Pay to the Company the costs of and incidental to the proceedings incurred by the Company up to the date of the Order dated 10 February 2022 on a full indemnity basis in the amount of US$777,000 and such other professional fees incurred by the Company prior to the date of the Winding Up Order which the Liquidators identify as being costs of and incidental to these proceedings;

   (ii) Pay Valley Health's costs, such costs to be taxed on an indemnity basis if not agreed.

   (iii) Make a payment on account of Valleys Health's costs in the amount of US$1,043, 606.50 being 50 % of the Petitioner's total costs claimed to 1 April 2020.

The Submissions

3. Mr. Faulkner on behalf of Valley Health submits that Augusta's conduct of the litigation has been unreasonable throughout and should be met with an order for indemnity costs. He submits more particularly that Augusta's Defence to the Petition was hopeless as it was irreconcilable with the contemporaneous documents which detailed in clear and unequivocal terms the breakdown in trust and confidence between the parties as well as Augusta's plan to force Valley Health out of the Company and for Augusta to become the "last man standing'; that the allegations of misconduct and conspiracy made against Valley Health and the Company's independent service providers were improper and that Augusta's failure to make efforts to settle was unreasonable.

4. Mr. Potts QC submits that the Petition raised novel questions of law and that it was reasonable for Augusta to defend the Petition on the grounds that the Company was not a quasi-partnership and that the relationship between the parties had not broken down irretrievably, particularly in light of the fact that the parties continued to work together on a variety of projects even after the Petition was filed and asserted that Augusta had advanced a Defence in which it honestly believed. Mr. Potts also maintains that there was no deadlock of a paralyzing kind, at Board or Shareholder level, and that it had been reasonable to defend the Petition on that ground.

The Costs Rules

5. Section 24(1) of the **Judicature Act (2021 Revision)** provides that subject to the provisions of the Act or any other Act or rules of Court, the costs of and incidental to all civil proceedings in the Grand Court shall be in the discretion of the Court. Section 24(3) provides that the Court shall have full power to determine by whom and to what extent costs are to be paid.

6. The award of costs on a contributory's petition is governed by Order 24, Part II of the **Companies Winding Up Rules, 2018** ("CWR"). O 24, r.8(2) states as follows:

> ***"General Rules as to Costs (O. 24, r. 8)***
>
> *8. (2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that –*
>
> *(a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or*
>
> *(b) if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed.*
>
> *…*
>
> *(4) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are* ***exceptional and special circumstances*** *which justify making some other order or no order for costs."*

7. In this matter the Court directed that the winding up petition be treated as an *inter partes* proceedings. It follows, despite Augusta's submissions to the contrary, that the costs fall to be paid by Augusta as the unsuccessful party.

Exceptional and Special Circumstances

8. The issue is whether there are exceptional and special circumstances which justify a departure from the general rule that costs be taxed on a standard basis. The parties agree that, in considering whether exceptional circumstances exists justifying a grant of indemnity costs, the Court should apply the same test as under GCR O. 62 r (4)(11) which provides that:

> *"The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."*

9. The authority for this proposition is the decision of Jones J in *Wyser-Pratt Eurovalue Fund* [2010] (2) CILR 233, who stated that where the Court makes a direction that a contributory's petition should be treated as an *inter partes* proceeding between the petitioning shareholder as applicant and the other shareholder as respondent, as here, then the purpose and effect of CWR O.24 r 8(2)(b) is that the opposing parties will be subjected to the same costs regime as that which applies to any other ordinary *inter partes* litigation governed by GCR O. 62.

10. Jones J provided the following exposition on the policy considerations behind the general rule as to costs on a successful contributory's petition under CWR O.24, r.8(2), and the circumstances in which the Court may make *"some other order"* pursuant to O.24, r.8(4):

> *"5. Different policy considerations apply when the court makes a direction pursuant to CWR O.3, r.11(2) that a contributory's petition should be treated as an inter partes proceeding between the petitioning shareholder(s) as applicant and the other shareholder(s) as respondent. Typically, the court will give a direction to this effect if the petition pleads that the company is a quasi-partnership. If the proceeding is characterized as ordinary adversarial litigation between individual shareholders, none of them will be allowed to finance their case out of the company's assets. By virtue of CWR, O.24, r.8(2)(b), the general rule in this type of case is that the unsuccessful shareholder(s) should pay the costs of the successful shareholder(s), such costs to be taxed on the standard basis if not agreed. The purpose and effect of this rule is that the opposing parties will be subjected to the same costs regime as that which applies to any other ordinary inter partes litigation governed by GCR, O.62.*
>
> *….*
>
> *….*
>
> *10. …. The general principle is that a successful party to any proceeding should be able to recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the court. By definition, such parties are acting against each other's interest. They are incurring legal fees for the purpose of advancing their own case and damaging their opponent's case. The jurisdiction to make such orders for costs is derived from s.24 of the Judicature Law (2007 Revision) and Part II of GCR, O.62. The policy reasons for regulating inter partes orders (sometime referred to as "party-and-party orders") are different from the reasons for regulating orders for the payment of costs out of a fund. Absent misconduct, inter partes orders are always made on the standard basis.*
>
> *….*
>
> *12. An inter partes order for costs to be taxed on the indemnity basis can only be made under Part II of the GCR, O.62 if the court is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, "improperly, unreasonably or negligently."*

11. The Court's discretion to order costs is "*extremely wide*" and "*not fettered or circumscribed*", though*"…it must be exercised judicially in the light of the particular facts of each case*" as noted by Williams J in *Ritter v Butterfield* [2018 (2) CILR 638] at [38] and [51].

12. Counsel have have helpfully canvassed a number of authorities in their written submissions. I extract from the authorities cited the following cases which set out the relevant principles fully and succinctly as well as the application of those principles to the facts.

Maintaining a Defence which is Manifestly Hopeless

13. Although the award of indemnity costs is concerned with the party's conduct of the proceedings, the inquiry is not unconnected with the merits as was explained by Henderson J in *Bennett v Attorney General* [2010 (1) CILR 478] at [6]:

> *"Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is manifestly hopeless. The latter can be characterized as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisers that the claim or defence is likely to fail, prefer to have that determination made by the court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all of the evidence over the predictions of his advisers which are limited, as they usually are, by not having observed the other side's witnesses under cross-examination. There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such a claim or advance such a defence. The usual result of such a finding is that the unsuccessful party will pay costs on the indemnity basis."*

14. Henderson J cited with approval the judgment of Coulson J in *Fitzpatrick Contractors Ltd.* v. *Tyco Fire & Integrated Solutions (UK) Ltd.* (2008] EWHC 1391 (TCC) who summarised the principles relating to an award of indemnity costs in the United Kingdom at para 3, and said this:

> *"There are a number of decisions, both of the TCC and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order. In both Wates Construction Ltd. v. HGP Greentree Allchurch Evans Ltd. [2006] BLR 45 and EQ Projects Ltd. v. Javid Alavi [2006] BLR 130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimants should have realised that their claim was hopeless and should not have taken the matter on to trial. However, in Healy-Upright v. Bradley & Another [2007] EWHC 3161 (Ch), the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by that party may be thought to have been unreasonable."*

15. On the facts, Henderson J held that as the defendant would not have understood the defence to be hopeless - indeed, the plaintiff's attorney had estimated his chance of success at 50% - costs would be awarded on the standard basis.

16. In *AHAB v Saad Investment Co. Ltd.* [2013 (2) CILR 344] the Chief Justice considered the circumstances in which the pursuit of a losing claim should be met with indemnity costs. His distillation of the principles to be applied is summarised in the headnote as follows:

> *"In considering awards for indemnity costs, the court's focus should be primarily on the conduct of the losing party, not on the substantive merits of the case. Such an award should be made only in exceptional circumstances, such as where the losing party had behaved improperly, negligently or unreasonably. Advancing a claim which was unlikely to succeed, or which did in fact fail, was not by itself sufficient for the award of indemnity costs; to justify such an award, there should normally be an element in the losing party's conduct which deserved a mark of disapproval. That conduct would need to be unreasonable to a high degree, though it may fall short of deserving moral condemnation."*

17. On the facts in front of him, the Chief Justice held that AHAB should not be penalized in costs as it had not acted unreasonably in pursuing its claim for fraud against the defendant, as the inference that the defendant was controlled and funded by the fraudster was based on a detailed report from a leading firm of accountants which showed that sums misappropriated by the fraudster from AHAB entities were transferred to the defendant.

18. On the facts of this case, I consider that it was unreasonable to the requisite degree for Augusta to have defended the Petition given Augusta's own internal documents which detailed the breakdown of the parties' relationship and noted that *"the distrust and feelings of bad faith which had developed amongst the partners"* were unlikely to resolve.

19. I do not accept, as Augusta has submitted, that there was anything novel in the allegation that corporate members of a company had a relationship based on mutual trust and confidence. On the facts, this was a company which had been established by a small group of Virginia hospitals to share the risk and rewards of operating a captive insurance business in which each, despite the varying size of their investment, had an equal say in the managing of the business. Augusta patently regarded Valley Health as a partner, albeit a partner who it no longer trusted. In light of the authorities, it should have been plain to Augusta that the argument made at trial, that it was '*legally impossible'* for the Company to be a quasi-partnership, was bound to fail.

20. Augusta's Defence to the Petition was manifestly hopeless and it should not have pursued the proceedings which involved a two week trial with all the attendant costs. In my judgment, the proper exercise of the Court's discretion is to order that Augusta pay Valley Health's costs to be taxed on the indemnity basis.

Making allegations of dishonesty and misconduct

21. In *Nike Real Estate Ltd. v. De Bruyne*, [2002 CILR 389], the Court held that indemnity costs may be awarded in the court's discretion if the unsuccessful party has acted in such a way as to abuse the

process of the court. Although conduct amounting to abuse for other purposes might not suffice for the purposes of an indemnity costs order, a party who urged the court to accept as truth a case in which it had no genuine belief would be guilty of such an abuse.

22. The decision was cited with approval by the Chief Justice in *Talent Business Investments Limited v. China Yinmore Sugar Company Limited* [2015 (2) CILR 113]. At para 39 of the judgment he said this:

> *"That the deliberate giving of false evidence can be sufficient to justify an award of costs on the indemnity basis has been clear for some time. In* Nike Real Estate Ltd. *v.* De Bruyne *(6) (a case decided on the basis of the court's inherent jurisdiction prior to the coming into force of O.62, r.4(11)), the court found that two of the defendants had colluded in giving false evidence. In the circumstances, the court was of the view that the case justified the award on the indemnity basis and granted costs to the plaintiff on that basis, observing (2002 CILR 33, at para. 15,* per *Kellock, Ag. J.):*
>
> > *"I do not think that either the High Court in England or this court exists for the purposes of encouraging people to put forward such a case, and if they do I would have thought that the charge of abuse of process was made out, at least to the extent necessary to justify an award of indemnity costs."*

23. Augusta maintained a defence which was inconsistent with its own internal documents and was, to that extent, dishonest. Its CEO gave evidence which was demonstrably false. Allegations of dishonesty and collusion were levelled by Augusta against senior executives of Valley Health as well as the Company's service providers which were wholly unsupported by the evidence.

24. Augusta's conduct in this respect fortifies my view that indemnity costs are justified to mark the Court's disapproval.

Failure to Settle

25. Valley Health also submits that an award of indemnity costs against Augusta is justified by the fact of Augusta's unreasonable refusal of settlement offers made by Valley Health each of which would have been a more favourable outcome to Augusta than it received on the Judgment is yet another ground for indemnity basis costs to be awarded.

26. Mr. Faulkner's written submissions run to many pages, as many offers to settle on a *without prejudice save as to costs basis* were made, but suffice it to say that Valley Health's most generous offer was a consensual no-fault divorce, which would avoid putting the Company in liquidation and incurring that expense. The offer included, for commercial reasons, a notional contribution of US$300,000 towards Augusta's legal costs in an effort to avoid further legal costs in proceeding to trial.

27. It was undeniably a better result than Augusta has achieved.

28. After the draft judgment was circulated and the day before it was due to be handed down - and all costs incurred - Augusta proposed a settlement in similar terms and provided for a no-fault divorce whereby each member would receive its allocable share of the Company's assets and liabilities on a non-discounted basis. The offer was properly rejected by Valley Health, in my view, particularly as Augusta invited Valley Health to accept the offer or be subject to years of ongoing litigation in the appellate courts.

29. While it is right to say, as Mr. Potts does, that the refusal to accept a settlement offer is not by itself a reason to award costs on the indemnity basis, it is a factor which the court can take into account. It was plainly unreasonable for Augusta to reject the offers to settle made by Valley Health in the circumstances where it had no arguable defence to the Petition on the just and equitable ground and this too fortifies my view that that the proper exercise of the Court's discretion is to make an order for taxation on the indemnity basis.

Issue-based Costs

30. Mr. Potts continues to argue, as he did in the substantive case, that the Company was not functionally deadlocked and invites the Court to make an *"issues based"* costs order which would penalise Valley Health for not succeeding on that ground. He proposes that any costs award be discounted by 50%.

31. It is not right to say that Valley Health lost on that issue. Rather, the Court held it was not necessary to decide whether Valley Health had succeeded on the alternative ground of functional deadlock, as the Court was satisfied that the Company was liable to be wound up on the ground that there was an undisputed and irretrievable breakdown in the relationship of trust and confidence between the parties.

32. In any event, the steer in the CWR is that the successful party should have the whole of its costs of the proceedings, including the costs of an issue on which it has failed, unless there are *exceptional and special circumstances* that justify making some other order. It seems to me that, the Court should not depart from the general rule unless the successful party has improperly or unreasonably increased the costs by pursuing an issue on which it has lost.

33. I, therefore, decline to follow the English decisions on which Mr. Potts relies including the well-known authority of *AEI Rediffusion Music Ltd v Phonographic Performance* [1999] 1 WLR 1507 in which the Court stated that that the change of emphasis in the English Rules (now reflected in GCR O.62) *"requires courts to be more ready to make separate orders which reflect the outcome on different issues"* and that *"it is no longer necessary for a party to have acted unreasonably or improperly to be deprived of his cost of a particular issue on which he has failed".*

34. I note for completion that the breakdown in the relationship between the parties led, in fact, to an impasse - a deadlock - with respect to the distribution of the retained earnings, as set out in the judgment, and a later inability to agree on how the costs of running the Company should be shared between the members. These events ultimately led to the filing of the Petition.

35. In those circumstances, it was neither unreasonable nor improper for Valley Health to advance its Petition on both grounds.

The Company's Costs

36. Valley Health contends that the Company alone has incurred costs of at least US$777,000 comprised of legal fees, costs associated with discovery and courtroom presentation services, trial transcription services and costs associated with arranging a neutral venue for witnesses to give evidence. These fees were authorised by the Company's Board which is comprised of the CEOs of both Valley Health and Augusta. The Company has also incurred significant costs arising from the Petition in professional fees from the Company's service providers.

37. Mr. Potts contends that these costs should be borne by the Company (through its Segregated Portfolio A), which would result in Valley Health indirectly bearing those costs in proportion to its 69% interest in the portfolio. I consider that this would be wrong in principle as such an order would penalise Valley Health on costs even though it was the successful party, as Mr. Faulkner submits. I also accept Mr. Faulkner's submission that the prohibition in the Rules against costs being paid out of the assets of the Company, where the matter proceeds on an *inter partes* basis, necessarily includes the costs incurred by the Company in those proceedings.

38. In making the order that Augusta pay the Company's costs to be taxed on the indemnity basis, I also take into account the fact that it was agreed between the parties during the course of the proceedings, contrary to the position now advanced by Mr. Potts, that the unsuccessful party would pay the Company's costs.

Payment on Account

39. In *Al Sadik v. Investcorp Bank B.S.C. and others* [2019 (2) CILR 585], Kawaley J summarised the governing principles under Cayman Islands law for the making of orders for payment on account of costs at para 25 as follows:

> *"(a) GCR O.62, r.4(7)(h) confers an unfettered discretion on the court to order the payment of 'where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily';*
>
> *(b) the governing principle underpinning this power, and the raison d'être for the rule, is that (per Jacob, J. in Mars UK Ltd. v. Teknowledge Ltd. (5) ([1999] 2 Costs L.R. at 47))- "the successful party is entitled to the money. In principle he ought to get it as soon as possible.*

It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount".

(c) ...The principle that a successful party should be paid some of his costs immediately and before taxation is not simply "an important consideration," it is the governing and predominant principle articulated by the interim payment on account of costs rule;

(d) the purpose of the rule is to enable the court to avoid the injustice of delayed payment of all costs until the total amount is determined upon taxation through a summary partial assessment. This is because the need to carry out a detailed assessment through taxation is "not a good reason" for not ordering some costs to be paid immediately. Whether or not the discretion should be exercised is not shaped by the need to do justice in an abstract sense, entirely untethered from the core purpose of the rule. Whether or not an interim payment on account of costs should be ordered will almost invariably require an assessment to be made of whether or not there is a good reason not to order an interim payment and/or a good reason for requiring the receiving party to be deprived of any costs until the taxation process is complete;

(e) GCR O.62, r.4 (7)(h), properly construed, contains an implicit starting assumption that an interim payment should be made. Obviously this starting assumption has somewhat less weight than an express statutory presumption. But the starting assumption arises from the indisputable fact that the core function of the rule is:

(i) to articulate the principle that the mere fact that a taxation hearing is pending is "not . . . a good reason" for depriving them of all of their costs, and

(ii) to empower the court to summarily assess an appropriate partial costs payment which immediately be made;…"

40. In his judgment, Kawaley J also identified the factors that weigh against the granting of an application for interim payment on account of costs which would include (i) the need to avoid stifling an appeal; (ii) whether the application for an interim payment would be a disproportionate proceeding; and (iii) the fact of the pendency of an appeal. With respect to the last, the Judge observed that the primary considerations might relate to the need to suspend any order (or secure repayment) rather than whether or not an order should be made.

41. The decision of this Court is currently on appeal. The only reason advanced by Augusta why an interim payment should not be made is that an appeal is pending. Adopting the learning in *Al Sadik*, I conclude that the order should be made in the terms proposed by Valley Health, but suspended to the conclusion of the appeal. This will ensure that, in the event Valley Health prevails in the appeal, the payment on account of its costs will not be delayed.

42. I turn to consider what would be a reasonable sum to order on account of Valley Health costs and whether the costs of Valley Health's foreign lawyers, including the work done by Leading Counsel

prior to his limited admission to practice in the Cayman Islands, are recoverable on the indemnity basis. This issue arises from the parties' competing submissions.

43. The general rule is set out in GCR O.62, r.18(1) which provides that:

> *"Work done by foreign lawyers may be recovered on taxation under these rules on the standard basis provided that . . .*
>
> *…*
>
> *(b) the work was done after he was admitted."*

44. In *Sagicor General Insurance (Cayman) Limited and another v. Crawford Adjusters (Cayman) Limited And Six Others* [2008] CILR 482 Henderson J held, at para 5 that:

> *"By the opening words of r.18 (1), it is made applicable only to a taxation of costs on the standard basis. This language is not accidental. Clearly, the intent was to exclude such considerations from any award of indemnity costs. Accordingly, that rule will have no application to any taxation of my costs award on the indemnity basis. Although some of the considerations mentioned in the rule (such as duplication of work) are still germane, O.62, r.18 (1) (b) is not applicable to the present case."*

45. In an earlier decision by Jones J in *Al Sadik V. Investcorp Bank BSC and five others* [2012 (2) CILR 33] the purpose of O 62 r 18 was explained at [6] and [7]:

> *"When orders for costs are made on what is called the "standard basis," the paying party is protected from the financial consequences of any tendency on the part of his opponent to conduct his litigation in a manner which is regarded as extravagant in the following ways… O.62, r.18 protects the paying party from the financial consequences of his opponent's decision to engage both local attorneys and foreign lawyers, which is inherently likely to result in extra and/or duplicated expense.*
>
> *In principle, an order for costs to be taxed on the "standard basis" in accordance with these rules and guidelines will compensate the successful party in respect of the reasonable legal fees and expenses incurred in conducting his action in an "economical, expeditious and proper manner." The effect of an order for taxation on the "indemnity basis" is that the paying party is deprived of the protections which apply in the ordinary case. The onus of proof is reversed. The proportionality rule does not apply. The legal fees scales do not apply with the result that the successful party may recover whatever hourly rates have been agreed with his attorneys unless the paying party can persuade the taxing officer that the contracted rates are unreasonably high (relative to those paid by the paying party). Most importantly in the context of proceedings pending in the Financial Services Division, the paying party will not have the protection of O.62, r.18, thereby exposing him to the risk of having to reimburse all the legal fees payable by the successful party to any foreign lawyers engaged by him, in addition to his local attorneys: see Sagicor Gen. Ins. (Cayman) Ltd. v. Crawford Adjusters (Cayman) Ltd. …"*

46. With respect to the quantum of the interim payment, a reasonable sum will often be an estimate of the likely final figure subject to an appropriate margin for error, which might be done by taking the lowest figure in a likely range, or making a deduction from a single estimated figure: see *Excalibur Ventures v Texas Keystone* [2015] EWHC 566 (Comm) in which 80% of the sum claimed was considered reasonable.

47. In my view, the proposed deduction of 50% reflects a very conservative estimate of the costs which are likely to be assessed and I accede to the application to make an order for the payment in the sum of $1,043, 606.50. I do not think there is any risk of overpayment but note that, given the amount of money in the Company under the control of the Liquidators, there will be no difficulty in Augusta recovering any sum which might be overpaid.

Confidentiality Application

48. Augusta applied by summons dated 25 March 2022 for Orders that:

(i) No person not a party to these proceedings be permitted to inspect the documents that were filed in the Costs Application;

(ii) The proceedings be heard in private; and

(iii) The judgment delivered by the Court on Valley Health's Costs Summons on the issue of costs or any matter which relates to or refers to *"without prejudice save as to costs"* material be embargoed until further Order of the Court or suitably redacted to remove any public disclosure of, or reference to, the terms or details of the parties' respective offers or counter-offers in *"without prejudice save as to costs"* communications.

49. The application is made by Augusta on the basis that the Orders sought are necessary to ensure that its pending appeal is not prejudiced. The suggestion is that if the *without prejudice save as to costs* correspondence, in which the parties set out divers terms on which the dispute might be settled, were to be made publicly available at this stage, the material might be put before the Court of Appeal *"either intentionally or inadvertently"* and might prejudice Augusta's appeal.

Jurisdiction and discretion to make sealing orders

50. The rules governing the application are the CWR, which provide at Order 1, rule 2(1) that the CWR will apply to every winding up application/every application made in a winding up proceeding.

51. Order 24 rule 6 provides as follows:

"Order for Documents to be Sealed (O.24, r. 6)

6. (1) The Court may direct that the whole or part of any report, order, affidavit or other document, except the petition, winding up order or supervision order, which has

been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the grounds that –

(a) the information in question is of a confidential nature and will not come into the public domain unless and until the document containing such information is filed in Court; and

(b) the publication or immediate publication of the information contained in the document will harm the economic interests of the creditors or contributories of the company."

52. In *Re Sphinx* [2017 (1) CILR 176] the learned Chief Justice made the following observations with respect to the exercise of the Court's discretion:

"22. Accordingly, the court has jurisdiction to make a sealing order under CWR, O.24, r.6 when the court is satisfied that the information in question is confidential and that sealing is necessary to protect the economic interests of the general body of stakeholders. Thus, both limbs of the test must be satisfied.

23. In In re Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage (Overseas) Ltd. (4), Jones, J. suggested (2011 (1) CILR 121, at para.2) that once jurisdiction was established, the court could only exercise its discretion to make a sealing order for the purpose of protecting the economic interests of the general body of stakeholders and that the court's power cannot be exercised for the benefit of third parties.

24. When exercising its discretion to make a sealing order, the court must have regard to the "overriding principle" that justice should be done. Of course, in a liquidation context, the protection of the economic rights of stakeholders and the interests of justice will often be one and the same. Nonetheless, depending on the circumstances of the case, protection of these rights may be only one of many criteria that the court should take into account when considering whether the interests of justice require a sealing order to be made. For example, other criteria to be considered could include those set out in s.11 (2) of the Constitution. Indeed, it is already established that the court often has regard to other criteria when making sealing orders or orders for anonymization in a liquidation context."

Discussion and Decision

53. Mr. Potts submits that Augusta's application satisfies both limbs of Order 24 rule 6 in that:

(i) the without prejudice correspondence is confidential to the parties and may cause harm to the parties if published in advance of the appeals process, and

(ii) it is in the interest of justice that the parties' right to a fair hearing on appeal be protected.

54. Mr. Faulkner submits to the contrary that the interests of justice do not require a sealing order to be made in the present case. He notes that the appeal will be conducted based on the material presented to the Grand Court *at* trial which, by definition, does not include correspondence to which privilege applied until *after* the Court delivered its judgment. As the documents will not be placed before the Court of Appeal, they can have no impact on the appeal.

55. This is plainly right.

56. With respect to the first limb of the test in O 24 r. 6(1) in my view, the privilege no longer attaches to the correspondence in issue. With respect to the second limb, there is no evidence to suggest that the publication of the fact of the settlement offers or the contents of those offers will harm the economic interests of the creditors or contributories of the Company. Invoking the more expansive *"interest of justice"* test formulated by the Chief Justice in *Re Sphinx* does not assist Augusta, as the correspondence will not be before the Court of Appeal and will not prejudice those proceedings.

57. Neither limb of the test in O 24 r.6 (1) is satisfied. I dismiss Augusta's application for a sealing order.

58. I am also not persuaded that the judgment needs to be embargoed or redacted. Mr. Potts' suggestion, that the Judges of Appeal might trawl through the public register and so become aware of the judgment and of the offers to settle made to the ultimate prejudice of Augusta's appeal, is not one I am prepared to entertain.

59. Augusta will pay Valley Health's costs of both applications on the standard basis, such costs to be taxed if not agreed.

DATED THE 23rd DAY OF AUGUST 2022

THE HON. JUSTICE MARGARET RAMSAY-HALE
JUDGE OF THE GRAND COURT